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# Spokeo Misspeaks

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## **SPOKEO MISSPEAKS**

*Lauren E. Willis\**

*Most commentators have critiqued the Supreme Court's opinion in Spokeo, Inc. v. Robins for failing to answer the question presented. But in important ways, the Spokeo opinion does not merely fail to speak—it affirmatively misspeaks. This essay suggests that underlying the Justices' inability to see how standing law ought to apply to the facts in Spokeo is a failure to appreciate the power that consumer reports have over individuals' life prospects today. Worse, the Justices' unawareness of their own ignorance leads them to afford Congress little deference in identifying injuries occurring in our new information society. Their meta-ignorance also induces the Justices to credit their own judgment over the judgment of the market about what consumer information is material to determinations about employment, credit, insurance, and other market transactions. These are strange moves to make in the name of standing, a doctrine founded on a belief in judicial restraint.*

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\* Professor of Law and Rains Senior Research Fellow, Loyola Law School, Los Angeles. Thanks to Chris Hoofnagle and Julie Cohen for inspiration, and to Marisa Tashman and Caitlin Hunter for tangible assistance. Errors and a bit of ironic presumptuousness are my own.

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## I. INTRODUCTION

In *Spokeo, Inc. v. Robins*,<sup>1</sup> the Supreme Court took its first case to address Article III standing in the information age and decided . . . naught. Perhaps that is for the best, given most Justices' demonstrated lack of familiarity with how personal information is used today and with how powerfully errors by purveyors of personal information undermine individuals' credit, insurance, employment, and other prospects.<sup>2</sup> This ignorance entwines with two loci of judicial overreaching in the Court's majority opinion: First, the Justices appropriate for themselves the authority to override Congressional identification of injuries occurring in today's new technological context. Second, the Justices assume that they know better than the market what information about consumers is material to determinations about employment, credit, insurance, and other market transactions. These are strange moves to make in the name of standing, a doctrine founded on a commitment to judicial restraint.

This essay first describes the facts presented in the case and shows how the Court's opinion demonstrates a failure to understand how information is used in society today. The essay then sets forth the method by which the Court should have located the injury required by the standing doctrine and should have analyzed the concreteness of that injury. A postscript directs plaintiffs' attorneys to state courts as a potential source of remedies for their clients, at least until the Supreme Court affirmatively recognizes that the preparation of an inaccurate consumer report is inherently injurious to the subject of that report in today's information society.

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1. 136 S. Ct. 1540 (2016).

2. The Justices' ignorance likely relates to both class and age. The hegemony of consumer reports is more salient to lower-income consumers, who are routinely denied credit, housing, and employment on the basis of these reports, than to the well-off in our society. CHRISTIAN E. WELLER, CTR. FOR AM. PROGRESS, ACCESS DENIED: LOW-INCOME AND MINORITY FAMILIES FACE MORE CREDIT CONSTRAINTS AND HIGHER BORROWING COSTS 1 (2007), [https://www.americanprogress.org/wp-content/uploads/issues/2007/08/pdf/credit\\_access.pdf](https://www.americanprogress.org/wp-content/uploads/issues/2007/08/pdf/credit_access.pdf). In addition, this power is a relatively recent phenomenon, as new technology has enabled expansion in the predictive capabilities of these reports and reduction in the cost of producing them. James Rufus Koren, *Some Lenders Are Judging You on Much More Than Finances*, L.A. TIMES (Dec. 19, 2015, 10:00 AM), <http://www.latimes.com/business/la-fi-new-credit-score-20151220-story.html>.

## II. WHAT HAPPENED

The underlying facts (as alleged by the plaintiff and thus taken as true at this motion to dismiss, pre-discovery stage<sup>3</sup>) are that Spokeo is a consumer reporting agency (CRA) that operates in willful violation of the Fair Credit Reporting Act (FCRA).<sup>4</sup> Specifically, Spokeo scrapes information from hundreds of online and offline sources and then compiles and sells reports that purport to be about identified individuals.<sup>5</sup> In this process, the company willfully fails to comply with the statute's requirement that it follow "reasonable procedures to assure maximum possible accuracy" of the information in its consumer reports.<sup>6</sup>

What are reasonable procedures that a CRA might take to increase the accuracy of its consumer reports? One obvious step would be to collect information only from sources that have a demonstrable track record of producing accurate data, rather than indiscriminately scraping data from any website. Another would be to use discerning algorithms to ensure that the CRA matches the information it collects with the correct consumer. In press reports, Spokeo's President has admitted that the company could have made its consumer reports more accurate through the development of better algorithms, but it had not bothered to do so.<sup>7</sup>

Spokeo's lack of reasonable procedures to assure maximum possible accuracy has apparently led directly to the central problem Congress attempted to thwart with the passage of the FCRA: inaccurate consumer reports. Spokeo's report on plaintiff Robins stated that he was married, had children, was in his fifties, had a job in

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3. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007).

4. *Spokeo*, 136 S. Ct. at 1546.

5. *Id.*

6. 15 U.S.C. § 1681e(b) (2012). The statute uses the term "consumer report," whereas the colloquial term is "credit report." "Consumer report" is more accurate, given that these reports contain information unrelated to credit history and are used for decisions about more than credit.

7. Kristin Samuelson, *Should I Be Worried About Spokeo.com?*, CHI. TRIB. (May 28, 2010), <http://newsblogs.chicagotribune.com/the-problem-solver/2010/05/should-i-be-worried-about-spokeocom.html> (quoting Spokeo's President as stating, "There are ways for us to improve information inaccuracies. If you aggregate more pulled sources, you can do an algorithm to improve the inaccuracies."); Betty Lin-Fisher, *Spokeo Web Site Raising Privacy Concerns*, OHIO.COM (May 9, 2010, 2:30 AM), <http://www.ohio.com/news/top-stories/spokeo-web-site-raising-privacy-concerns-1.169961> (quoting Spokeo's president as stating, "There are algorithms we can do that we haven't had time to improve the inaccuracies."). This "grow the business now, comply with the law later" attitude is becoming increasingly common among startup companies. *See, e.g., Shredding the Rules*, THE ECONOMIST (May 2, 2015), <http://www.economist.com/news/business/21650142-striking-number-innovative-companies-have-business-models-flout-law-shredding>.

a professional or technical field, and, well after plaintiff instituted suit, continued to state that he held a graduate degree and was fairly affluent.<sup>8</sup> According to Robins, none of these things were true. In a companion case, the plaintiff alleged that false information about her in Spokeo's reports included that she was married, had children, was fifty years old, was a Republican and a Protestant, and was college-educated but lacked a graduate degree.<sup>9</sup> Robins's complaint also pointed to ways in which Spokeo's standard operating procedures violated other FCRA requirements, manifesting the company's general willful disregard of the entire statute.<sup>10</sup>

At the time Spokeo was offering Robins's error-riddled report to employers and others, Robins was looking for a job.<sup>11</sup> The errors in Robins's report created a substantial risk that he would be denied employment opportunities for any number of reasons. For example, an employer could erroneously conclude that as a married man with children, he would not want to relocate or would be expensive to relocate; or that as an affluent job candidate, he would have high salary demands; or that as a candidate holding a graduate degree and a job in a technical or professional field, he would be overqualified for a position for which he was, in truth, suitable.<sup>12</sup> Bare discrepancies between Robins's job applications and the report produced by Spokeo purporting to be about him could lead employers concerned about false information on applicant resumes to discard his application.<sup>13</sup> Robins could have been excluded from consideration for jobs for which he had not applied but for which he was a good match; if an employer, for recruiting purposes, bought lists from Spokeo of individuals meeting specific parameters and Robins met those parameters, Spokeo nonetheless might not have included Robins due to errors in the data it associated with him.<sup>14</sup>

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8. 136 S. Ct. at 1546; Brief of Respondent at 8–9, *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016) (No. 13-1339), 2015 WL 5169094.

9. Second Amended Complaint at 5, *Purcell v. Spokeo, Inc.*, No. 2:11-CV-06003-ODW-AGR (C.D. Cal. Sept. 9, 2011), 2011 WL 12506511.

10. Brief of Respondent, *supra* note 8. On remand, plaintiff has abandoned his attempt to establish standing with respect to these additional violations.

11. First Amended Complaint at 7, *Robins v. Spokeo, Inc.*, No. 2:10-CV-05306-ODW-AGR (C.D. Cal. Feb. 17, 2011), 2011 WL 7782796.

12. See Brief of *Amici Curiae* Information Privacy Law Scholars in Support of Respondent at 23–24, *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016) (No. 13-1339), 2015 WL 5261535, at \*23–24. Full disclosure: This author co-authored the Information Privacy Law Scholars brief.

13. See *id.* at 25–26.

14. See *id.* at 25.

The district court held that Robins lacked standing to sue Spokeo based on the errors in the report Spokeo produced about him, the Ninth Circuit reversed, and, on Spokeo's petition, the Supreme Court agreed to hear the case.<sup>15</sup>

### III. WHAT THE COURT SAID

The case split the Court, with Justices Roberts, Kennedy, Breyer, and Kagan joining the majority opinion penned by Justice Alito.<sup>16</sup> Justice Thomas wrote a thoughtful concurrence,<sup>17</sup> and Justice Sotomayor joined Justice Ginsburg in a cursory dissent.<sup>18</sup> The following critiques the majority opinion. It also provides a brief description of some of the ways in which information about individuals is used in society today, an aspect of the modern world with which Congress has attempted to keep pace by enacting and repeatedly amending the FCRA.

The majority opinion in *Spokeo* reads like a bad law student exam, in two respects. First, it sets forth superficial and facially contradictory statements of legal rules extracted from the Court's prior standing cases, with no resolution of those conflicts. Second, it never discusses how those rules apply to the facts of this case.

The majority writes "[t]he law of Article III standing . . . serves to prevent the judicial process from being used to usurp the powers of the political branches."<sup>19</sup> The opinion proceeds, in Orwellian fashion, to announce that the judicial branch must ensure that Congress does not "erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing."<sup>20</sup> The opinion then reverses course, noting that Congress "is well positioned to identify intangible harms that meet minimum Article III requirements,"<sup>21</sup> and "has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before."<sup>22</sup> In yet another about-face,

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15. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1544 (2016).

16. *Id.* at 1544.

17. *Id.* at 1550–54 (Thomas, J., concurring).

18. *Id.* at 1554–56 (Ginsburg, J., dissenting).

19. *Id.* at 1547 (quoting *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1146 (2013) (internal quotation marks omitted)).

20. *Id.* at 1548 (quoting *Raines v. Byrd*, 521 U.S. 811, 820 n.3 (1997) (internal quotation marks omitted)).

21. *Id.* at 1549.

22. *Id.* (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 580 (1992) (Kennedy, J., concurring

the majority follows this with the assertion that a plaintiff does not satisfy Article III's injury-in-fact requirement "whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right."<sup>23</sup>

Next comes the assertion that "a bare procedural violation"<sup>24</sup> or "deprivation of a procedural right"<sup>25</sup> is not enough to confer standing on the person deprived of that procedural right. That assertion is immediately contradicted by the following: "[T]he violation of a procedural right granted by statute can be sufficient in some circumstances to constitute injury in fact. In other words, a plaintiff in such a case need not allege any *additional* harm beyond the one Congress has identified."<sup>26</sup> Along the way the majority states that to have standing, a plaintiff must allege an injury that is "concrete," meaning "real" and "not abstract," but then explains that "intangible injuries," such as a "risk of real harm," can satisfy the injury requirement of Article III.<sup>27</sup>

To be fair, the Court's previous jurisprudence on standing doctrine's injury requirement is not a model of consistency or clarity. On the one hand, some prior cases have allowed Congress to define an actionable injury, even though absent the statute there would be no legally or socially recognized harm. For example, the Court has held that citizens given the right to obtain information from government agencies by Congress's passage of various statutes (e.g., the Freedom of Information Act) have standing to sue to enforce those statutes when an agency refuses to produce that information.<sup>28</sup> Yet without the statutes, it is unlikely that the denial of information requested from an agency would be conceptualized as inflicting a concrete harm on the requester.<sup>29</sup> In contrast, the Court has also held that even when

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in part and concurring in the judgment) (internal quotation marks omitted)).

23. *Id.*

24. *Id.* at 1550.

25. *Id.* at 1549 (quoting *Summers v. Earth Island Inst.*, 555 U.S. 488, 496–97 (2009) (internal quotation marks omitted)).

26. *Id.* at 1549.

27. *Id.* at 1548–49.

28. *Taylor v. Sturgell*, 553 U.S. 880, 885 (2008). ("If an agency refuses to furnish the requested records, the requester may file suit in federal court and obtain an injunction 'order[ing] the production of any agency records improperly withheld.'"); *Public Citizen v. U.S. Dept. of Justice*, 491 U.S. 440, 449 (1989) ("Our decisions interpreting the Freedom of Information Act have never suggested that those requesting information under it need show more than that they sought and were denied specific agency records.").

29. See Cass R. Sunstein, *Informational Regulation and Informational Standing: Akins and*



Congress gives citizens a right, such as the right to comment on agency regulations, depriving individuals of that right does not itself give them standing absent some further interest in the action the agency was taking that might have been affected by those comments.<sup>30</sup>

It is unclear why depriving an individual of the statutory right to comment on government regulations is not, alone, a cognizable injury, but the bare deprivation of an individual's statutory right to government-held information provides the requester with Article III standing. The Court's opinion in *Spokeo* amplifies the inconsistency between holdings such as these rather than reconciling them.<sup>31</sup>

Additionally, the Court fails to apply the law it announces to the facts of this case. This is regrettable; such an exercise might have helped the Court identify and resolve some of the inconsistencies in existing standing doctrine. The one attempt by the majority opinion to apply the law to a fact involves a fact that is not present in this case: a consumer report containing an erroneous zip code. The Court thus gratuitously decides an issue not briefed or even present in the case and therefore lacking the "concrete adverseness which sharpens the presentation of issues"<sup>32</sup> that the concreteness requirement in standing doctrine is meant to ensure. Worse, the majority's advisory statements about this hypothetical fact reveal a profound ignorance about the use of information in society today.

The majority opinion states: "[N]ot all inaccuracies cause harm or present any material risk of harm. An example that comes readily to mind is an incorrect zip code. It is difficult to imagine how the dissemination of an incorrect zip code, without more, could work any

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*Beyond*, 147 U. PA. L. REV. 613, 641–43 (1998) (suggesting that without a federal statute requiring disclosure of certain records of advisory committees, "it is not clear that there would be a legally cognizable 'injury'" to a party denied these records).

30. *Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009); *see also* *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 572 n.7 (1992).

31. Justice Thomas's concurrence attempts to reconcile the two lines of cases as follows: He characterizes those cases where Congress is free to define an injury that gives rise to standing as cases involving private rights, and those cases where the Court will insist on locating a concrete injury that it believes "exists" even absent Congressional recognition as cases involving public rights. *See Spokeo*, 136 S. Ct. 1550–54 (2016) (Thomas, J., concurring). However, the line between public and private rights is left unclear and some cases, such as the cases giving citizens the right to sue for information possessed by the government, seem to fall on the public side yet the plaintiffs are recognized by the Court as having standing based on an injury solely defined by Congress.

32. *City of Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)).

concrete harm.”<sup>33</sup> But one need not imagine how an incorrect zip code could harm someone; one can readily find examples. In addition to the obvious problem of misdirected mail,<sup>34</sup> an erroneous zip code can decrease the probability of being called in for a job interview.<sup>35</sup> Some employers use zip codes to screen out job candidates who are likely to be expensive to relocate<sup>36</sup> or who are likely to lack certain job-related characteristics that are desirable.<sup>37</sup> Zip codes affect credit granting and pricing decisions.<sup>38</sup> The wrong zip code can raise a consumer’s auto,

33. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1550 (2016). The dissenters imply that they agree with this facile zip code analysis. *Id.* at 1556 (Ginsburg, J., dissenting).

34. Sarah Fenske, *Any Error in Your Mailing Address Could Send Your Package to Post Office Hell*, L.A. WEEKLY (Dec. 20, 2013, 6:00 AM), <http://www.laweekly.com/news/any-error-in-your-mailing-address-could-send-your-package-to-post-office-hell-4255056>.

35. *See, e.g.*, Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991, 1003 (2004) (comparing neighborhood racial makeup, education levels, and median income at the zip code level to the probability that a job applicant will be called for an interview and finding a “significant effect of neighborhood qualit[ies] on the likelihood of a callback,” when resumes are otherwise equal). The U.S. Armed Services even uses zip codes to determine who to recruit for service. OFFICE OF INSPECTOR GEN., U.S. POSTAL SERV., *THE UNTOLD STORY OF THE ZIP CODE* 7 (2013), [http://postalmuseum.si.edu/research/pdfs/ZIP\\_Code\\_rarc-wp-13-006.pdf](http://postalmuseum.si.edu/research/pdfs/ZIP_Code_rarc-wp-13-006.pdf).

36. *See, e.g.*, Meridith Levinson, *Recruiting Software: 10 Ways Job Seekers Can Beat the System*, CIO (Oct. 26, 2009, 8:00 AM), <http://www.cio.com/article/2423539/careers-staffing/recruiting-software--10-ways-job-seekers-can-beat-the-system.html> (“Another way applicant tracking systems screen candidates is on the basis of their location. Hiring managers can program these systems so that they only select candidates who live within, say, a 20 mile radius of the job. Employers use area codes and zip codes to screen people in because they prefer not to relocate people.” (internal citation and quotation marks omitted)).

37. *See, e.g.*, *Can an Employer Hire Only Applicants Who Live in the Same Neighborhood as the Business?*, NOLO, <http://www.nolo.com/legal-encyclopedia/can-employer-hire-only-applicants-live-the-same-neighborhood-the-business.html> (last visited Jan. 28, 2017) (“I’m applying for jobs as a bartender. At one bar, the manager told me that they only hire people who live in the same neighborhood. They toss any applications that come from outside the bar’s zip code.”).

38. *See, e.g.*, FED. TRADE COMM’N, *BIG DATA: A TOOL FOR INCLUSION OR EXCLUSION? UNDERSTANDING THE ISSUES* ii (2016), <https://www.ftc.gov/system/files/documents/reports/big-data-tool-inclusion-or-exclusion-understanding-issues/160106big-data-rpt.pdf> (explaining that “rather than comparing a traditional credit characteristic, such as debt payment history,” new data analysis products “may use non-traditional characteristics—such as a consumer’s zip code, social media usage, or shopping history—to create a report about the creditworthiness of consumers that share those non-traditional characteristics, which a company can then use to make decisions about whether that consumer is a good credit risk.”); Scott Sheldon, *How a Typo Can Derail Your Mortgage*, CREDIT.COM (June 24, 2015), <http://blog.credit.com/2015/06/how-a-typo-can-derail-your-mortgage-119298> (explaining that lenders may consider an applicant a higher risk of default if the zip code on the application is incorrect).

homeowners, or health insurance rates.<sup>39</sup> An incorrect zip code can even prevent a citizen from having her vote counted.<sup>40</sup>

Today's society runs on information, often through algorithmic calculations of probabilities that are then associated with individuals.<sup>41</sup> Decisions about employment, credit, insurance, housing, and much more are determined by reference to banks of data collected, curated, and maintained by CRAs.<sup>42</sup> In effect, one's "reputation" in society today is, to a significant extent, based on one's consumer report. Thus, an individual's interest in the accuracy of her consumer report is the modern analogue to the reputational interests protected by the common law of defamation. Justice Stewart once characterized an individual's right to protect those reputational interests as reflecting "our basic concept of the essential dignity and worth of every human

39. See, e.g., Susan Ladika, *How Your Zip Drives Up Rates*, CARINSURANCE.COM (Jan. 18, 2014), <http://www.carinsurance.com/Articles/zip-code-car-insurance.aspx> ("Something as simple as moving from one ZIP code to another in the same city—even if you've just moved across the street and your driving record, claims history and vehicle remain the same—can cause your car insurance rates to skyrocket."); Linda Melone, *How Does Zip Code Change Home Insurance Rates?*, INSURANCE QUOTES (Feb. 7, 2012, 4:02 PM), <http://www.insurancequotes.com/insurance-tips/home-insurance-zip-code> ("Moving from one ZIP code to another can raise your insurance rates, even if the new home sits only a few blocks away from your current one."); *What Are California Health Insurance Rates Based On?* CALHEALTH.NET, [http://www.calhealth.net/california\\_health\\_insurance\\_rates\\_based\\_on.htm](http://www.calhealth.net/california_health_insurance_rates_based_on.htm) (last visited Jan. 28, 2017) ("Your individual health insurance is based on your age and the zip code you live in. Zip code can swing rates but your age is really the driving factor.").

40. See, e.g., Alice Miranda Ollstein, *Supreme Court Ensures Thousands of Ohio Ballots Will Be Thrown Out for Small Error*, THINKPROGRESS (Nov. 1, 2016), <https://thinkprogress.org/supreme-court-ensures-thousands-of-ohio-ballots-will-be-thrown-out-for-small-error-s-1ebfc8fe5c5f#8kcb0865n> ("Under Ohio law, if a voter's name, birthday, or address on their provisional ballot does not exactly match the state's records—even if it's the state records that have a typo or error—the ballot can be thrown out."); *Rep. Clyde Previews 5 Problems to Watch for in Election 2014*, OHIO HOUSE OF REPS. (Oct. 30, 2014), <http://www.ohiohouse.gov/kathleen-clyde/press/rep-clyde-previews-5-problems-to-watch-for-in-election-2014> ("A missing zip code or apartment number might disqualify a ballot or it might not, depending on the county.").

41. Danielle Keats Citron & Frank Pasquale, *The Scored Society: Due Process for Automated Predictions*, 89 WASH. L. REV. 1, 2–4 (2014) (recounting some of the many ways algorithmic analyses of data are used to predict human behavior and to then make decisions about employment, credit, housing, recidivism, insurance, and more).

42. See, e.g., CONSUMER FIN. PROT. BUREAU, KEY DIMENSIONS AND PROCESSES IN THE U.S. CREDIT REPORTING SYSTEM: A REVIEW OF HOW THE NATION'S LARGEST CREDIT BUREAUS MANAGE CONSUMER DATA 5 (2012), [http://files.consumerfinance.gov/f/201212\\_cfpb\\_credit-reporting-white-paper.pdf](http://files.consumerfinance.gov/f/201212_cfpb_credit-reporting-white-paper.pdf) (noting research indicating that over half of U.S. employers use consumer reports to screen applicants for at least some job positions); *id.* at 2 ("Credit reports play an increasingly important role in the lives of American consumers. Most decisions to grant credit—including mortgage loans, auto loans, credit cards, and private student loans—include information contained in credit reports as part of the lending decision. These reports are also used in other spheres of decision-making, including eligibility for rental housing, setting premiums for auto and homeowners insurance in some states, or determining whether to hire an applicant for a job.").

being—a concept at the root of any decent system of ordered liberty.”<sup>43</sup> For the Court to have difficulty seeing the injury wrought by misinformation in consumer reports is to fail to recognize how credit reports affect the dignity and worth of individuals today.

Unfortunately, this information society runs on is often poor. The information age might just as aptly be called the *misinformation* age, sometimes with horrific results.<sup>44</sup> For users of the data it is rarely cost-effective to pay for CRAs to incur the expense of reasonable procedures that would ensure maximum possible accuracy—or for that matter, even a fair degree of accuracy.<sup>45</sup> In contrast, the financial, emotional, and dignitary costs of being erroneously excluded from job opportunities (or credit or insurance or voting) can be enormous for the individual.<sup>46</sup>

For example, an employer could use error-riddled Spokeo reports to decide whom to recruit or interview, and then, at the next stage of the hiring process, eliminate the candidates who had errors in their reports if the true information disqualified the candidate. This process would erroneously exclude some good candidates from consideration, with consequent loss of job opportunities for those individuals. However, unless good candidates are rare, the cost of paying for consumer reports created using better algorithms or more accurate information sources is not worth the benefit to the employer of discovering those candidates erroneously excluded by dint of Spokeo’s sloppy procedures.<sup>47</sup>

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43. *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (Stewart, J., concurring).

44. Witness the young man who believed the online false news stories spread by Trump supporters that Hillary Clinton was running a pedophilia ring out of a pizzeria and who then took up arms against innocent people at the restaurant. Mike Wedling, *The Saga of ‘Pizzagate’: The Fake Story That Shows How Conspiracy Theories Spread*, BBC (Dec. 2, 2016), <http://www.bbc.com/news/blogs-trending-38156985>.

45. See, e.g., NAT’L CONSUMER LAW CTR., AUTOMATED INJUSTICE: HOW A MECHANIZED DISPUTE SYSTEM FRUSTRATES CONSUMERS SEEKING TO FIX ERRORS IN THEIR CREDIT REPORTS 30 (2009), [https://www.nclc.org/images/pdf/credit\\_reports/credit\\_reports\\_automated\\_injustice\\_report.pdf](https://www.nclc.org/images/pdf/credit_reports/credit_reports_automated_injustice_report.pdf) (“[T]raditional competitive market forces provide little incentive for credit bureaus to incur the costs of instituting new procedures that ensure information is accurate or to undertake investigations to correct errors, since these activities primarily benefit consumers. Only the FCRA itself compels such behavior.”).

46. See Jill Riepenhoff & Mike Wagner, *Dispatch Investigation: Credit Scars*, DISPATCH (May 6, 2012, 12:01 AM), <http://www.dispatch.com/content/stories/local/2012/05/06/credit-scars.html> (“[M]istakes on credit reports can inflict widespread damage.”).

47. See, e.g., Vivian Giang, *Why New Hiring Algorithms Are More Efficient—Even if They Filter Out Qualified Candidates*, BUS. INSIDER (Oct. 25, 2013, 10:51 AM), <http://www.businessinsider.com/why-its-ok-that-employers-filter-out-qualified-candidates-2013-10>.

If users were willing to pay sufficiently more for better information, the market itself would produce better information.<sup>48</sup> As noted, Spokeo's President admitted that the company could make its reports more accurate through the development of better algorithms, but had not made the effort to do so.<sup>49</sup> The FCRA requires CRAs to follow reasonable procedures to assure maximum possible accuracy because Congress understood that the market would not produce this on its own, and Congress found that common law defamation actions were insufficient to solve the problem.<sup>50</sup>

#### IV. WHAT THE COURT SHOULD HAVE SAID

The question the Court's opinion should have answered was whether being subjected to inaccurate consumer reporting constitutes a "concrete injury." The majority's embarrassing attempts to use the dictionary to understand the definition of "concrete"—a word the Court itself had selected to describe the requirements for standing in federal court<sup>51</sup> ("concrete" appearing nowhere in the text of Article III<sup>52</sup>)—are no help. "De facto injury," "real injury," etc. are all indeterminate.

Professor David Engel puts it bluntly: "[I]njuries are not objective facts"; they are culturally defined.<sup>53</sup> In thirteenth century England, damage to honor and reputation was the primary type of injury cognizable in court, but subsequently the culture shifted to focus more on physical and direct economic harm.<sup>54</sup> Other "injuries" that existed in early American law no longer exist. For example, adultery by a wife (but not by a husband) was once considered a tort, without any proof

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48. Cf. JoAnne Yates, *Investing in Information: Supply and Demand Forces in the Use of Information in American Firms, 1850–1920*, in *INSIDE THE BUSINESS ENTERPRISE: HISTORICAL PERSPECTIVES ON THE USE OF INFORMATION* (Peter Temin, ed., 1991), <http://www.nber.org/chapters/c7180.pdf>.

49. See, e.g., Samuelson, *Supra* note 7.

50. 15 U.S.C. § 1681 (2012) ("It is the purpose of this subchapter to require that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information in accordance with the requirements of this subchapter.").

51. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 580 (1992).

52. See U.S. CONST. art. III.

53. David M. Engel, *Perception and Decision at the Threshold of Tort Law: Explaining the Infrequency of Claims*, 62 DEPAUL L. REV. 293, 319–20 (2012). Even the sensation of pain depends on cognitive, emotional, and behavioral input that is heavily influenced by culture. *Id.*

54. See, e.g., Anne Bloom, *Plastic Injuries*, 42 HOFSTRA L. REV. 759, 789 (2014).

that the husband suffered any consequence beyond being cuckolded.<sup>55</sup> Society and the law continue to recognize new “injuries.” For example, segregation is now recognized as an injury in and of itself, but at one time only unequal treatment, meaning inferior tangible facilities, could be the basis of a legal injury.<sup>56</sup> Assault and battery committed as part of a campaign of harassment were torts,<sup>57</sup> but, until recently, sexual harassment alone was not actionable.<sup>58</sup>

Further, the point at which an injury becomes sufficiently complete to be actionable is also culturally-contingent. The negligent infliction of emotional distress at varying times and places was not viewed as a complete tort until and unless physical manifestations of distress appeared.<sup>59</sup> Yet many traditional “intangible injury” torts are complete without evidence that the plaintiff experienced any physical, emotional, or economic injury. For false imprisonment, a victim must be aware of confinement and nonconsenting, but need not experience any further damage other than the loss of physical freedom itself.<sup>60</sup> Most analogously to the FCRA violation alleged in *Spokeo*, the tort of

55. See, e.g., MARTHA CHAMALLAS & JENNIFER WRIGGINS, *THE MEASURE OF INJURY: RACE, GENDER AND TORT LAW* 38–39 (2010).

56. Compare *Plessy v. Ferguson*, 163 U. S. 537 (1896) (announcing “separate but equal” doctrine), with *Brown v. Bd. of Educ.*, 347 U.S. 483, 493–95 (1954) (overturning *Plessy* on the grounds that segregation is inherently damaging, with no further proof of unequal facilities required).

57. See Krista J. Schoenheider, *A Theory of Tort Liability for Sexual Harassment in the Workplace*, 134 U. PA. L. REV. 1461, 1466 (1986) (“In early court cases, victims had to rely on traditional tort doctrines for relief.”); see also *Skousen v. Nidy*, 90 Ariz. 215 (1961) (at a time when sexual harassment itself was not actionable, upholding verdict for plaintiff employee on assault and battery claims against her employer for non-consensual physical contact and pushing her in the course of making unsuccessful “efforts to seduce” her).

58. See, e.g., CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* xi (1979) (“Sexual harassment has been not only legally allowed; it has been legally unthinkable.”); *id.* at 1 (“[W]orking women have been subject to the social failure to recognize sexual harassment as an abuse at all.”). In the 1970s and 1980s, courts began to recognize sexual harassment as a cognizable claim even in the absence of assault, battery, or other common law tort. See Schoenheider, *supra* note 57, at 1467 n. 38 (1986) (citing cases).

59. See, e.g., Robert L. Rabin, *Emotional Distress in Tort Law: Themes of Constraint*, 44 WAKE FOREST L. REV. 1197 (2009) (explaining the historical limitations on the recovery of damages for claims of emotional distress); Scott D. Marrs, *Mind over Body: Trends Regarding the Physical Injury Requirement in Negligent Infliction of Emotional Distress and “Fear of Disease” Cases*, 28 TORT & INS. L.J. 1 (1992–1993) (documenting the differing physical injury requirements imposed by various jurisdictions for recovering emotional distress damages).

60. See, e.g., Robert L. Rabin, *Pain and Suffering and Beyond: Some Thoughts on Recovery for Intangible Loss*, 55 DEPAUL L. REV. 359 (2006) (“[I]n the venerable tort of false imprisonment, the prima facie case is made out by establishing an unjustified constraint on the victim’s freedom of locomotion. Physical injury, let alone pecuniary loss, plays no role in establishing the right to recovery.”).

libel requires the plaintiff to demonstrate only the publication of a false and defamatory—in the general sense of likely to cause harm—statement, which is presumed to injure the subject’s reputation; the plaintiff need not show actual damages.<sup>61</sup>

In a deep sense, all types of injuries are actionable without total completion; every legal definition of a concrete injury is prophylactic, and always presumes “actual” injury. A broken tooth is unquestionably sufficiently concrete to confer standing, with no further proof of hedonic pain reaching the brain or economic loss. Someone who does not feel pain and whose broken tooth provides her with income from dentistry students who pay her to fix it to obtain clinical experience may not have damages, but she has a concrete injury. Someone who comes to know the meaning of life, makes profitable life changes, and thus is hedonically and economically better off as a consequence of being the victim of a tort or statutory violation still has standing to sue.

Given that injuries and the moment they come into existence are evolving social and legal constructs, how should federal courts determine whether something is a “concrete injury”? By ascertaining what Congress or the common law has identified as an injury in the relevant context, and then checking to ensure that judicial recognition of such a set of facts as constituting an injury is not inconsistent with the purposes of the concreteness requirement of Article III standing doctrine.<sup>62</sup> The following performs these “injury” and “concreteness” inquiries with respect to the injury alleged by the plaintiff in *Spokeo*.

### A. The Injury

Congress did not provide consumers a private right of action for all FCRA violations, but it did give them a private right of action for a violation of the requirement that “[w]henver a consumer reporting agency prepares a consumer report it shall follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates.”<sup>63</sup> Congress

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61. *Id.* at 364. *See also* W.J.A. v. D.A., 210 N.J. 229, 246–47 (2014) (reaffirming New Jersey law’s commitment to presumed damages in ordinary libel and slander per se cases, such that the plaintiff need not demonstrate actual injury to reputation, and cataloguing other jurisdictions that follow the same rule).

62. *Cf.* Sunstein, *supra* note 29, at 617–18 (“[W]hether there is an ‘injury’ cannot be decided in the abstract, or solely by reference to the ‘facts’; it turns instead on positive law.”).

63. 15 U.S.C. § 1681e(b) (2012).

recognized that having misinformation in a consumer report prepared by a CRA injures the consumer to whom the report ostensibly relates.<sup>64</sup> Congress could have substantively prohibited CRAs from producing inaccurate consumer reports and allowed any consumer to sue a CRA that prepares an inaccurate report purporting to be about that consumer.<sup>65</sup> Instead, Congress gave industry some wriggle room, demanding not accuracy itself but instead imposing a variety of procedural requirements intended to produce accurate reports, including that CRAs follow reasonable procedures to assure maximum possible accuracy of the information in consumer reports they prepare.<sup>66</sup>

Robins is not suing for a bare procedural violation, the bald failure of Spokeo to follow reasonable procedures to assure maximum possible accuracy when preparing consumer reports. A CRA could fail to use any such procedures and yet produce an accurate report about Robins, in which case Robins would have no standing to sue.<sup>67</sup> Instead, Robins's injury is the very injury Congress sought to prevent—the injury of having an inaccurate consumer report prepared about oneself.

Why is the moment of report preparation the point at which Congress chose to hold CRAs responsible, the point at which the statutory violation is complete and damages are presumed? CRAs do not maintain millions of continually updated consumer “reports.”<sup>68</sup> CRAs either maintain continually updated files of data they associate with individual consumers when they store the data, or they maintain continually updated banks of data about millions of consumers which can be queried to produce data the CRAs associate with individual consumers.<sup>69</sup> CRAs prepare reports about individual consumers from those files or those databases only when employers or others request a

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64. *Id.* § 1681.

65. I have argued elsewhere that this type of performance-based regulation, mandating that firms achieve a certain outcome and allowing firms to then determine for themselves how to reach the outcome, is often preferable to micromanagement of firms' internal processes. Lauren E. Willis, *Performance-Based Consumer Law*, 82 U. CHI. L. REV. 1309 (2015).

66. 15 U.S.C. §§ 1681–1681x (2012).

67. Conversely, a CRA might follow reasonable procedures to attain maximum possible accuracy and yet still produce a consumer report that contains errors. In such a case the consumer whose report contained such errors would have standing, but would lose the case on the merits.

68. See CONSUMER FIN. PROT. BUREAU, *supra* note 42, at 3, 14–17.

69. See *id.* at 22.



report.<sup>70</sup> Until a report is prepared, the accuracy of the report that will be prepared is unknown; CRAs can design the report preparation process in various ways that affect the accuracy of the reports.

Robins has alleged that Spokeo's production of an inaccurate consumer report about him caused him anxiety and reduced employment prospects. Anxiety is a common response when people discover that the information being spread about them is false, even when the individual has no evidence that any third party has acted upon that information.<sup>71</sup> The existence of a consumer report containing false information about oneself is particularly worrying to anyone who knows the power consumer reports have over one's life. One consumer whose report contained errors due to two transposed digits in his social security number explains: "You feel so violated . . . It's a personal assault on your good name."<sup>72</sup> Every year, millions of Americans are sufficiently distressed by errors in the reports CRAs produce about them to complain to government regulators and to CRAs about errors in their reports.<sup>73</sup>

Turning to employment opportunities, the amount by which the inaccurate report reduced Robins's job prospects is unknown and unknowable.<sup>74</sup> No employer could say at this point with any certainty whether it would have hired Robins if Spokeo had provided it with accurate information about him or had included him in a list of recruiting prospects. Moreover, because Spokeo does not require those to whom it provides reports to disclose their identities, there is no way to know which employers obtained from Spokeo either a report specifically about Robins or a list that should have included Robins's name but did not.<sup>75</sup> The inability in many situations to prove the extent

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70. See *id.*

71. See, e.g., *Shafir v. Steele*, 727 N.E.2d 1140, 1146 (Mass. 2000) (describing a defamed individual's experience of distress and anxiety as "the natural result" of defamation).

72. *Riepenhoff & Wagner*, *supra* note 46.

73. Americans complained to the national CRAs alone (not counting complaints to other CRAs or filed with the Consumer Financial Protection Bureau, the Federal Trade Commission or state attorney generals) eight million times in 2011. CONSUMER FIN. PROT. BUREAU, *supra* note 42, at 27. One consumer might have filed more than one complaint so it is not possible to know exactly how many people complained, but even if every consumer who filed a complaint did so with each of the three national CRAs, that would mean over two and a half million Americans complained in a single year.

74. Cf. *W.J.A. v. D.A.*, 43 A.3d 1148, 1159 (N.J. 2014) ("[F]or a private person defamed through the modern means of the Internet, proof of compensatory damages respecting loss of reputation can be difficult if not well-nigh insurmountable.").

75. See *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1546 (2016).

of injuries caused by inaccurate consumer reports is precisely why Congress allowed for statutory damages in the FCRA.<sup>76</sup>

Anxiety and diminished employment, credit, insurance, and other prospects are analogous to presumed damages in ordinary libel cases, damages the Supreme Court has never blinked at.<sup>77</sup> In a case where a business brought a common law defamation claim and collected presumed damages for an error in its credit report, the Court did not even raise the question of standing.<sup>78</sup> Thus, for standing purposes, Robins need not produce evidence of emotional distress injuries or demonstrate the degree to which Spokeo's errors reduced his job prospects or affected his reputation. Under the FCRA, no further reputational, dignitary, emotional, or economic damages are needed to complete the injury inflicted upon Robins by Spokeo's failure to follow reasonable procedures to assure maximum possible accuracy; having an inaccurate consumer report prepared by a CRA about oneself is presumed injurious. The Court should defer to Congress's better-informed judgment in defining this injury.

### *B. Concreteness*

The purpose of the concreteness requirement in standing law is to ensure that plaintiffs have a "an actual, as opposed to professed, stake in the outcome, and that the 'legal questions presented . . . will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action.'"<sup>79</sup> Assurance of a sharp controversy, with arguments pressed vigorously by both sides, requires both particularity and concreteness. Not just that *this* plaintiff have a stake (particularity), but that this plaintiff have a *stake* (concreteness). Moreover, the availability of statutory damages alone cannot give the plaintiff a sufficient stake to satisfy standing requirements.<sup>80</sup>

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76. 15 U.S.C. § 1681n(a)(1)(A); *see also* Brief of *Amici Curiae* Information Privacy Law Scholars in Support of Respondent, *supra* note 12 (explaining legislative history and discussing other statutes, such as the Copyright Act, that similarly provide for statutory damages because of the difficulty of tracing the effects of the statutory violation).

77. *See* *Gertz v. Welch, Inc.*, 418 U.S. 323, 349 (1974) ("Under the traditional rules pertaining to actions for libel, the existence of injury is presumed from the fact of publication.").

78. *Dun & Bradstreet, Inc. v. Greenmoss Builders*, 472 U.S. 749 (1985). Business credit reports are not covered by the FCRA.

79. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 581 (1992) (Kennedy, J., concurring).

80. *See Spokeo*, 136 S. Ct. at 1548.

Thus, the concreteness question is whether the inaccurate consumer report Spokeo prepared about Robins, standing alone, creates a dispute in which Robins has a sufficient stake to pursue his claim as a true adversary against Spokeo. Or, does Robins lack a sufficient stake to pursue his claim as a true adversary until and unless the inaccurate report causes Robins further demonstrable harm?

Certainly consumers believe they are harmed when the reports CRAs produce about them contain errors. As noted, every year millions of Americans file complaints about errors in their reports.<sup>81</sup> Many of these complaints are about “header” information, including current or previous name, address, or employment.<sup>82</sup> These consumers understand something the members of the Court apparently do not—that in the modern world, *any* inaccuracy creates a material risk of tangible harm to consumers.<sup>83</sup> A CRA’s preparation of inaccurate consumer reports so dims the consumers’ employment, insurance, credit, and other prospects that millions of them are willing to spend time and effort to correct the errors.<sup>84</sup> This is clear evidence that consumers experience inaccurate consumer reports as sufficiently concrete injuries to motivate them to pursue their disputes with CRAs as true adversaries.

The FCRA envisions that individuals will obtain their own consumer reports annually and take steps to correct inaccuracies even in the absence of *specific* credit, insurance, or employment

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81. See *supra* note 73.

82. FED. TRADE COMM’N, REPORT TO CONGRESS UNDER SECTION 319 OF THE FAIR AND ACCURATE CREDIT TRANSACTIONS ACT OF 2003 v (2012), <https://www.ftc.gov/sites/default/files/documents/reports/section-319-fair-and-accurate-credit-transactions-act-2003-fifth-interim-federal-trade-commission/130211factareport.pdf>; see also Riepenhoff & Wagner, *supra* note 46 (finding that significant proportion of consumer complaints to the FTC and to their State Attorney General’s office were about “basic personal information listed incorrectly: names, Social Security numbers, addresses and birth dates”).

83. It is also true that an error in a consumer report could benefit a consumer, but information that is conventionally viewed as “positive” does not necessarily benefit a consumer. For example, as explained above, an overstatement of qualifications or income in a consumer report could lead some employers to remove the prospective employee from consideration for employment.

84. See Bobby Allyn, *How the Careless Errors of Credit Reporting Agencies Are Ruining People’s Lives*, WASH. POST (Sept. 8, 2016), <https://www.washingtonpost.com/posteverything/wp/2016/09/08/how-the-careless-errors-of-credit-reporting-agencies-are-ruining-peoples-lives/> (“It took me more than a dozen phone calls, the handiwork of a county court clerk and six weeks to solve the problem. And that was only after I contacted the company’s communications department as a journalist.”); Martha C. White, *Why Are Credit Report Errors So Hard to Fix?*, TIME (May 8, 2012), <http://business.time.com/2012/05/08/why-are-credit-report-errors-so-hard-to-fix> (describing the months it can take to convince a CRA to remove an error from a consumer’s report).

opportunities that they foresee being affected.<sup>85</sup> Congress knew that many would take action to keep their reports accurate—in effect, keeping their reputations clean—for dignitary ends and to stop the anxiety they would naturally feel due to the substantial risk that inaccurate information will cause them more tangible problems in the future.

The situation here parallels that found in a case where the Supreme Court held that organic alfalfa growers had standing when they faced a “significant risk” that their crops would be infected by genetically-modified crops as a result of a statutory violation.<sup>86</sup> The Court found that even if the alfalfa growers’ crops were never actually infected with the genetically-modified crops, the time, money, and effort the growers spent to prevent contamination were “sufficiently concrete to satisfy the injury-in-fact prong of the constitutional standing analysis.”<sup>87</sup>

But what of the majority’s assertion as fact, based on no evidence or briefing, that “not all inaccuracies [in consumer reports] cause harm or present any material risk of harm”?<sup>88</sup> Is there *any* error in a consumer report that would be so insignificant that it would not produce a material risk of harm?

Probably not. One investigative report explains: “They can look like harmless errors: A misspelled name. A transposed number. A paid debt listed as past due. But mistakes on credit reports can inflict widespread damage.”<sup>89</sup> A mistake about the date a debt became delinquent could lead collectors to pursue, and consumers (who otherwise would have refused) to pay, debt that is beyond the statute of limitations for collection in court and no longer reportable by a CRA.<sup>90</sup> The misspelling of a name can lead to a denial of credit, insurance, or employment and endless headaches for consumers

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85. See 15 U.S.C. § 1681j (2012).

86. See *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 140 (2010).

87. *Id.* at 155.

88. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1550 (2016).

89. Riepenhoff & Wagner, *supra* note 46.

90. See, e.g., NAT’L CONSUMER LAW CTR., *supra* note 45, at 11–12 (explaining how debt collectors “re-age” debt by reporting an incorrect date of delinquency); Ciele Edwards, *Why a Debt Collection Agency Would Re-Age Your Debt With a Credit Bureau*, ARIZONA CENTRAL, <http://yourbusiness.azcentral.com/debt-collection-agency-would-re-age-debt-credit-bureau-4852.html> (last visited Feb. 11, 2017) (“Re-aging consumer debts benefits collection agencies because doing so extends the amount of time the negative information lingers within your credit history. The rationale behind this is that you have more incentive to pay if doing so will result in the delinquent account reflecting a ‘paid’ status on your credit reports.”).

forced to straighten out the mess.<sup>91</sup> And as previously explained, even erroneous zip codes pose a risk of real injury.<sup>92</sup>

Information in a consumer report can affect an individual in unforeseen ways, as computer analysis of data from swaths of the population reveal surprising correlations. Employers, creditors, and insurers then act upon these correlations, deeply affecting people's lives.<sup>93</sup> Many such correlations are closely held trade secrets, but lenders have revealed, for example, that applicants who fill out their applications in all caps have a reduced likelihood of repaying their debts as compared to those who use standard rules of capitalization.<sup>94</sup> Other companies are exploring whether web search history correlates with credit repayment behavior.<sup>95</sup> If a CRA decides to include data on handwriting and web searches in the consumer reports it prepares, that data will be covered by the FCRA's requirements, just as the data about marital and parental status, age, current employment, education, wealth, and even zip code found in Spokeo's report on Robins is covered by those requirements.<sup>96</sup>

Congress did not mandate that CRAs must follow reasonable procedures with respect to some pieces of information and not others when CRAs prepare consumer reports.<sup>97</sup> Information is only collected

91. See, e.g., *Smith v. LexisNexis Screening Solutions, Inc.*, 837 F.3d 604 (6th Cir. 2016) (affirming compensatory but not punitive damages against CRA in case of employment denial based on consumer report produced for a "David Alan Smith" but containing criminal history of a "David Oscar Smith"); NAT'L CONSUMER LAW CTR., *supra* note 45, at 8 (recounting case where credit was denied on the basis of consumer report errors and the consumer's thirteen-year battle with the CRA to correct errors in reports it produced purporting to be about her).

92. *Supra* notes 35–40 and accompanying text.

93. See FED. TRADE COMM'N, *supra* note 38, at 9–12 (raising the concern that the use of big data analytics to make predictions based on correlations may exclude certain populations from the benefits society and markets have to offer); PAM DIXON & ROBERT GELLMAN, WORLD PRIVACY FORUM, THE SCORING OF AMERICA: HOW SECRET CONSUMER SCORES THREATEN YOUR PRIVACY AND YOUR FUTURE 39 (2014), [www.worldprivacyforum.org/wp-content/uploads/2014/04/WPF\\_Scoring\\_of\\_America\\_April2014\\_fs.pdf](http://www.worldprivacyforum.org/wp-content/uploads/2014/04/WPF_Scoring_of_America_April2014_fs.pdf) (explaining that predictions about individuals are made based on patterns detected in information about large pools of the population).

94. See James Rufus Koren, *What Does That Web Search Say About Your Credit?*, L.A. TIMES (July 17, 2016, 9:00 AM), <http://www.latimes.com/business/la-fi-zestfinance-baidu-20160715-snap-story.html>.

95. See *id.*

96. See FED. TRADE COMM'N, *supra* note 38, at 16 (noting that the FCRA would apply to CRAs that compile and sell non-traditional information such as social media information and shopping history).

97. 15 U.S.C. § 1681a(d) (2012) ("The term 'consumer report' means any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal

and bought if it is valuable enough to employers, insurers, creditors, and other consumer report users to pay for it.<sup>98</sup> Congress, in effect, left the marketplace to decide which information would be subject to the requirement of reasonable procedures to ensure maximum possible accuracy. The Court is poorly situated to override the judgment of the market.

## V. WHAT HAPPENS NOW

What will be the upshot of the *Spokeo* decision? In the *Spokeo* case itself, the Ninth Circuit heard argument this past December.<sup>99</sup> If the Ninth Circuit finds that Robins has standing, another petition for Supreme Court review seems likely, presumably in the hopes that a new Justice will vote to narrow current Article III standing doctrine. But both wisdom and humility can be gained over time, and perhaps the Justices will approach any return of the case with more expertise about consumer reports and more deference to the judgments of Congress and of the market.

## VI. POSTSCRIPT

Even if the Court definitively narrows its federal standing jurisprudence in a return of *Spokeo* or in another case, savvy plaintiffs' attorneys may well play this to their benefit.

Many state court systems have more relaxed standing requirements than those in federal court.<sup>100</sup> State courts can adjudicate

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characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for [e.g., credit, insurance, or employment]." (emphasis added)).

98. Paul Boutin, *The Secretive World of Selling Data About You*, NEWSWEEK (May 30, 2016, 2:30 PM), [www.newsweek.com/secretive-world-selling-data-about-you-464789](http://www.newsweek.com/secretive-world-selling-data-about-you-464789) (describing data brokers and the commoditization of consumer information).

99. Oral Argument, *Robins v. Spokeo, Inc.*, No. 11-56843 (9th Cir. argued Dec. 13, 2016), [http://www.ca9.uscourts.gov/media/view\\_video.php?pk\\_vid=0000010737](http://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000010737). As of this writing, the Ninth Circuit has not issued an opinion.

100. See, e.g., *Lansing Sch. Educ. Ass'n v. Lansing Bd. of Educ.*, 792 N.W.2d 686, 699 (Mich. 2010) ("[A] litigant has standing whenever there is a legal cause of action"); *Trustees for Alaska v. State*, 736 P.2d 324, 327 (Alaska 1987) ("Standing in our state courts is not a constitutional doctrine; rather, it is a rule of judicial self-restraint based on the principle that courts should not resolve abstract questions or issue advisory opinions."); *Langford v. Superior Court*, 729 P.2d 822, 833 n.6 (Cal. 1987) ("California's [standing] requirements are less stringent than those imposed by federal law."); *Jersey Shore Med. Ctr.-Fitkin Hosp. v. Baum's Estate*, 417 A.2d 1003, 1006 (N.J. 1980) (under New Jersey standing law, plaintiff must "show sufficient personal stake and adverseness so that the Court is not asked to render an advisory opinion"). See generally JENNIFER FRIESEN, STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS, AND

claims of violations of federal or state law, and they are not required to apply Article III to either type of claim.<sup>101</sup> If plaintiffs' attorneys file statutory damages claims in state courts with liberal standing requirements and defendants have a basis for removal to federal court, any lack of Article III standing will force federal courts to remand the cases back to state court.<sup>102</sup> In fact, given this certainty, a removal petition would lack a proper purpose and ought not be filed in the first place.<sup>103</sup>

For issues of federal law, a defendant who loses in the state system will ultimately have the right to petition for Supreme Court

DEFENSES § 7.09[2] (4th ed. 2008) (reviewing state court standing requirements that are less restrictive than federal court standing requirements).

101. *See* *Asarco Inc. v. Kadish*, 490 U.S. 605, 617 (1989) ("We have recognized often that the constraints of Article III do not apply to state courts, and accordingly the state courts are not bound by the limitations of a case or controversy or other federal rules of justiciability even when they address issues of federal law, as when they are called upon to interpret the Constitution or, in this case, a federal statute. Although the state courts are not bound to adhere to federal standing requirements, they possess the authority, absent a provision for exclusive federal jurisdiction, to render binding judicial decisions that rest on their own interpretations of federal law." (citations omitted)); *City of Los Angeles v. Lyons*, 461 U.S. 95, 113 (1983) ("[T]he state courts need not impose the same standing or remedial requirements that govern federal court proceedings.").

102. *See, e.g.,* *Polo v. Innoventions Int'l, LLC*, 833 F.3d 1193 (9th Cir. 2015) (remanding consumer protection class action wherein, after removal pursuant to the Class Action Fairness Act of 2005, the District Court found that the named plaintiff lacked standing); *Coyne v. Am. Tobacco Co.*, 183 F.3d 488, (6th Cir. 1999) (holding that lack of standing requires a remand to state court); *Wheeler v. Travelers Inc. Co.*, 22 F.3d 534 (3d Cir. 1994) ("[I]f a district court finds that a plaintiff in a removed case does not have standing, it will remand the case to the state court."); *Maine Ass'n of Interdependent Neighborhoods v. Comm'r*, 876 F.2d 1051, 1053–54 (1st Cir. 1989) (holding that lack of standing requires a remand to state court); *Rodriguez v. RWA Trucking Co., Inc.*, 190 Cal. Rptr. 3d 663 (Ct. App. 2013), *as modified* (Sept. 20, 2013), *publication ordered*, 352 P.3d 881 (Cal. 2015) (holding, after removal to federal court and remand to state court for lack of Article III standing, that plaintiff class members had standing in California state court); *Roberts v. BJC Health Sys.*, 391 S.W.3d 433, 438 (Mo. 2013) (holding, after removal to federal court and remand to state court for lack of Article III standing, that plaintiff had standing in Missouri state court); *McCaughtry v. City of Red Wing*, 808 N.W.2d 331, 331 (Minn. 2011) (holding, after removal to federal court and remand to state court for lack of Article III standing, that plaintiff had standing in Minnesota state court); *Drayson v. Wolff*, 661 N.E.2d 486 (Ill. App. Ct. 1996) (holding, after removal to federal court and remand to state court for lack of Article III standing, that plaintiff had standing in Illinois state court).

Even cases recently dismissed from federal court rather than remanded to state court on *Spokeo*-based grounds, so long as the statute of limitations has not passed, can be refiled in state court. Although the district court in this case apparently dismissed Robins's complaint with prejudice, that was erroneous; a dismissal for lack of Article III standing is not a judgment on the merits and therefore has no claim preclusive effect. *See* *Media Techs. Licensing LLC v. Upper Deck Co.*, 334 F.3d 1366 (Fed. Cir. 2003); *St. Pierre v. Dyer*, 208 F.3d 394 (2d Cir. 2000).

103. *FED. R. CIV. P.* 11; *Mocek v. Allsaints USA Ltd.*, No. 16 C 8484, 2016 WL 7116590, at \*1 (N.D. Ill. Dec. 7, 2016) (ordering remand to state court and for defendant to pay plaintiff's attorney fees where defendant removed case to federal court and then argued that plaintiff lacked standing).

review because such a loss would impose a concrete and particularized injury giving the defendant standing to appeal.<sup>104</sup> However, state court standing requirements are not issues of federal law, and they are the only standing requirements applicable in state court. Thus, even if *Spokeo v. Robins* returns to the Supreme Court and the majority bungles the Article III standing analysis by denying plaintiffs access to the federal courts to pursue FCRA claims, plaintiffs may be able to pursue their FCRA cases in state court systems that have less stringent standing requirements.

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104. *Asarco*, 490 U.S. at 618, 624. *Asarco* states:

Although respondents would not have had standing to commence suit in federal court based on the allegations in the complaint, they are not the party attempting to invoke the federal judicial power. Instead it is petitioners, the defendants in the case and the losing parties below, who bring the case here and thus seek entry to the federal courts for the first time in the lawsuit. We determine that petitioners have standing to invoke the authority of a federal court and that this dispute now presents a justiciable case or controversy for resolution here . . . . We are not unmindful of the paradox that would result if respondents (plaintiffs below) prevail on the merits, for then they will have succeeded in obtaining a federal determination here that would have been unavailable if the action had been filed initially in federal court. Nonetheless, although federal standing often turns on the nature and source of the claim asserted, it in no way depends on the merits of the claim.

*Id.*



